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Supreme Court of the United States

OCTOBER TERM, 1965

No. 550

MARIO PREZIOSO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Fifth Amendment 3

Supreme Court of the United States

October Term, 1965

No.

MARIO PREZIOSO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Mario Prezioso, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on July 9, 1965.

Opinion Below

The opinion of the Court of Appeals, printed in the appendix hereto, *infra,* is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on July 9, 1965 (Appendix, *infra*). Mr. Justice Harlan has, by order, extended the time for filing this petition for certiorari to and including September 7, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Where a defendant (petitioner Prezioso) has pleaded guilty to an indictment but before sentence moves to withdraw the plea on the ground of an intervening disclosure by a co-defendant (Zochowski—in a motion to withdraw his own plea of guilty) that he had been a secret Government operative in numerous Federal criminal investigations including this one; on the further ground that, while Prezioso previously had some general idea of Zochowski's having had some kind of undercover Government role and that this may have involved the present case, Prezioso's counsel undisputedly had not known anything at all of Zochowski's role; and on the further ground that these developments indicated Prezioso might realistically have a defense of entrapment if he were allowed to withdraw his guilty plea and stand trial—in these circumstances was it not a manifest abuse of discretion, under the liberal provisions of Rule 32(d) F.R.Cr. P. as to withdrawal of a plea of guilty *before sentence,* to deny Prezioso's motion to withdraw the plea, the hearing on the motion having moreover developed substantial evidentiary confirmation of Prezioso's contentions concerning Zochowski.

2. Was Prezioso denied a fair hearing on his aforesaid motion through rulings which, in contravention of the Jencks Act and *Brady* v. *Maryland* (373 U.S. 83), deprived him of access to relevant Government notes and records and which blocked him from exploring pertinent lines of inquiry that could have thrown additional light on the role of the Government undercover agent Zochowski?

Constitutional Provision, Statute and Rule Involved

The case involves the Fifth Amendment due process clause, Rule 32(d) F.R.Cr.P., and the Jencks Act (18 U.S.C. §3500). Rule 32(d) reads as follows:

> "(d) WITHDRAWAL OF PLEA OF GUILTY.
>
> A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

Statement of the Case*

1. Introductory

The judgment of the Court of Appeals here sought to be reviewed affirmed a judgment of the United States District Court for the Southern District of New York (24a) which convicted petitioner on two substantive counts and one conspiracy count (11a) of transporting stolen securities in interstate commerce (18 U.S.C. §§ 2314, 371 and 2), said judgment of conviction having followed a denial of Prezioso's motion (i.e., before sentence) to change his guilty plea to "not guilty" under Rule 32(d), F.R.Cr.P. (R. 352). Prezioso was sentenced to three years on each

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* " a" refers to the printed "Appellant's Appendix" filed by Prezioso in the Court below, nine extra copies of which are believed to have been filed previously with the Clerk of this Court in connection with the docketing of the certified Record by another defendant-petitioner in this case, Giuliano. "R." refers to the certified Record.

count,* to run concurrently, with eligibility for parole at such time as the Parole Board may determine (24a). Prezioso was free on bail pending appeal, and the Court of Appeals has stayed the issuance of the mandate and allowed continuation of bail pending petition for certiorari.

The ground for the motion to withdraw the plea of guilty—see details *infra*—was that a co-defendant in the case, Zochowski, had disclosed in papers filed by him in the Court below on a motion to withdraw his own plea of guilty before sentence (17a) that he had allegedly been a secret operative of the F.B.I. (and of other Federal Government police agencies) in connection with the investigation of the matters charged in the within indictment as well as in connection with numerous other federal criminal investigations. Prezioso's position was, in essence, that he would not have pleaded guilty if he and his attorneys had known the facts which had now been disclosed by Zochowski, because he would have chosen to stand trial on a realistic prospect of a defense of entrapment.

2. The Proceedings on the Prezioso and Zochowski Motions to Withdraw the Pleas of Guilty

Zochowski in support of his motion to withdraw his plea of guilty (June 12, 1964) alleged in an affidavit (17a) that he was innocent of the crimes charged because he did not have

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* Note that although Prezioso was given a flat three-year sentence (24a), Zochowski was treated far more leniently since the sentence of two years and eight months imposed upon him was made concurrent with another sentence which he was then serving; the sentencing minutes make it clear that Zochowski was given this grace as a reward for his very substantial services to the Government as an informer in numerous criminal matters (R. 365 et seq.).

the requisite criminal intent, in that "I was actively engaged in undercover work and in secret services for the Federal Bureau of Investigation and the Secret Service during all this period, and I was providing information to the Bureau which, in part, resulted in the apprehension of all the defendants in this case. As a matter of fact, I provided information which resulted in my own arrest in this matter." Zochowski's affidavit went on to recite numerous supporting details.

On July 29, 1964, a hearing was held before Judge Palmieri on the Zochowski motion and on an oral motion by Prezioso for withdrawal of his plea of guilty (R. 2-3). The oral motion was (R. 171-172):

> "Mr. Edelbaum: • • •
>
> Your Honor, • • • I am orally moving for the withdrawing of the defendant Prezioso's plea of guilty on the ground that at the time the defendant Prezioso pleaded guilty he had, nor his attorney had, no knowledge of the fact that Chester Zochowski, also known as Chester Gray, was possibly acting as an undercover agent for the Federal Bureau of Investigation.
>
> Defendant Prezioso, through his conferences with me and also through his conferences with the Assistant United States Attorney in preparation for the trial, indicates that the securities he stole from Sutro Bros. was at the request and at the behest and under threats and duress by Chester Gray • • •
>
> • • • • •
>
> "• • • your Honor could deny Zochowski's motion not on the grounds alone that the statement is untrue, but your Honor could find that there was a

> possibility he was an agent for the FBI but also that there was no mistake or fraud or duress at the time he took his plea, that he wilfully took his plea, and deny his motion to withdraw his plea on that basis and there would still be a basis for the defendant Prezioso's motion."

The Government conceded at the outset of the hearing that Zochowski had in fact worked as a Government informant, but insisted that the crimes involved in the present indictment (the so-called Sutro thefts, etc.) were entirely individual activities on Zochowski's part and he was not in any way acting as an informant in connection with those crimes (R. 173).

Zochowski testified that at the time of his guilty plea he was "guilty of the act, not guilty in the respect that I ever intended to profit by any proceeds" (R. 176). He was first employed by the F.B.I. around June 1960, through an Agent named Clinkscales in Miami, Florida; he was told that Washington approved (R. 176-178). He went to work for the F.B.I. at a "salary" of $175 a week, which continued for about sixteen months, to about October 1961, when he removed himself from the salary basis because he was expecting to move to Mexico (R. 178-179).* Zochowski did not carry through his plan of moving to Mexico, and he continued to serve the Government in the same capacity as before, although apparently no longer on the "salary"

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* Clinkscales testified that Zochowski was not on a "salary" but that Clinkscales was authorized to pay him up to $125 per week plus $50 expenses upon evaluation of Zochowski's services in specific matters (*infra*).

basis.* Zochowski estimated that in the period after he went off "salary" he had handled perhaps one hundred or more cases for the Government, in the course of which he had numerous contacts with F.B.I. Agents Clinkscales or Sweeney of the Miami office (R. 179-180). The Government conceded that Zochowski had continued to supply information to it up to almost the time of his surrender under the present indictment on April 1, 1964 (R. 184).

Testifying as to his activities for the Government during the period covered by the matters charged in the within "Sutro" indictment, i.e., November 1961 to July 1962, Zochowski described a case involving stolen diamonds (February 1962) in which he worked with Clinkscales and Sweeney of the Miami F.B.I. office, and a counterfeiting operation (late 1961) in which he made reports to Secret Service Agents Terrino and Motto in New York City (R. 187-189).

Zochowski's direct testimony concerning his services in the Sutro matter appears at R. 190-207. Although this testimony is far from being a model of conciseness or clarity, it unmistakably has Zochowski making, in essence, the following claims: His work for the Government on the Sutro case was part of a larger investigative picture involving several other matters. In order for Zochowski to be able to accomplish those other matters for the Government, he had to engage also in the Sutro activity, because the money which the Sutro culprits were hoping to obtain from that

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* The Government conceded that Zochowski was owed payment for those services (R. 281-283, 293). Zochowski himself said that the Government owed him perhaps as much as $20,000 (R. 247-248). Requests by Prezioso's counsel for disclosure of the records of payment and amounts due to Zochowski were denied—see our discussion of this *infra*.

project would in turn lead to further illicit activities by those same persons in regard to certain counterfeit bonds and certain stolen bonds cases in which the Government was anxious to have Zochowski's assistance. In this overall picture which thus involved Sutro collaterally, Zochowski said he dealt with F.B.I. Agent Clinkscales and Sweeney in Miami, and with Agent Marlin Moore in the Chicago office. The Chicago phase, Zochowski said, involved his expressly mentioning to Agent Moore certain facts relating to co-defendant Wuensche in this case, although Zochowski said he did not mention the name Sutro to Moore in this connection because he did not at that time know the source from which Wuensche was supposed to be getting stolen securities. Zochowski did give Agent Moore a telephone number which he had heard Wuensche use on the occasion when the latter was calling some contact of his to ask about having certain stolen securities delivered to him. This Wuensche phase in Chicago, Zochowski said, involved primarily a counterfeit bond matter, but Zochowski considered that Wuensche wanted the proceeds from the stolen securities (indicatedly the Sutro securities) in order to purchase the counterfeit bonds, the latter being the item on which Zochowski was primarily working with Agent Moore of the Chicago office of the F.B.I. It is true that Zochowski's testimony falls short of averring explicitly that he fully or meaningfully informed the Miami and Chicago Agents about the Sutro matter, but Zochowski's theme in this hearing was that his own Sutro activities were absolutely viewed by himself as part and parcel of his larger activity as a Government informer. Zochowski also mentioned that he knew the Government's agents did not want to become directly involved in the commission of any actual crimes.

But the inference is very strong from this testimony of Zochowski that he himself, acting upon what he evidently thought was his proper discretion and responsibility, did consider it proper and necessary to help along (if not actually to provoke) the Sutro project in order to help solve those larger cases above mentioned. All of the foregoing is fairly derivable, as we have said above, from Zochowski's testimony at R. 190-207; and this same picture was further elaborated by Zochowski in his cross-examination (R. 207-216, 219-222, 235-236, 239-240).

Zochowski's own understanding of the latitude which the F.B.I. agent allowed him in his undercover work was such as would make it quite plausible to believe that Zochowski acted as an agent provocateur (R. 249).

At R. 240-241 Zochowski stated that his first contact with Prezioso, which was in October 1961, occurred after he had originally informed Agent Clinkscales of an expected theft of securities from a brokerage house in New York City. At R. 242-243 it was brought out that a few months prior to the within hearing the Government had interceded on Zochowski's behalf to have him exonerated of charges of being involved in a shooting. See also Zochowski's testimony at R. 245-246, indicating the closeness of the overall cooperation between Agent Clinkscales and Zochowski down to the time of Zochowski's own arrest in the Sutro case.

Zochowski testified that several Government officials were spoken to by him in an effort to have the present indictment dropped on the ground of his having acted as a Government agent in the situation. These persons included Secret Service Agent Motto in New York, F.B.I. Agent Moore in Chicago, and Assistant United States Attorney

Bitman in Chicago; as to Mr. Bitman, Zochowski said "I know he asked in person that this indictment be dropped against me" (R. 281).

F.B.I. Agent Clinkscales (R. 260, *et seq.*) confirmed that Zochowski had become an informer for the F.B.I. in June 1960, and that he was to be paid up to $125 a week plus $50 expenses, based on evaluation of the information which he produced (R. 261-262, 264). Zochowski stayed on the above mentioned compensated basis until November or December 1961, when his contemplated move to Mexico caused him to terminate the compensation (R. 264-265)—as Zochowski himself had testified, *supra*. Clinkscales said that Zochowski had provided "significant information to the F.B.I." during the above mentioned compensation period, and that he had continued to give information to the F.B.I. thereafter (R. 265)—again confirming Zochowski's testimony.

Although it is true that Clinkscales did testify in this hearing pretty explicitly to the effect that Zochowski never informed him about the Sutro matter until around the time of Zochowski's own arrest (or impending arrest) in that matter, Clinkscales also said (R. 96-97):

> "Q. Directing your attention to the fall of 1961, at any time during that period of time did Zochowski tell you of a plan to steal half a million dollars worth of securities? A. In June or July of 1961 he told me that he had been contacted by an individual whom he did not identify, did not name, but he had been contacted by an individual in New York City who claimed to have access to some $200,000 or $300,000 of stolen securities which, it was represented to him, Zochowski, at the time, had been taken in

the robbery of a messenger from a stock brokerage Company. He did not identify the stock brokerage company. He did not identify the messenger. He did not identify the individual who had contacted him in this regard or at any time later to me."

When Clinkscales was asked how many cases involving stocks and bonds Zochowski had worked on with him in the years 1961 and 1962, he said (R. 277-280):

"A. I don't know exactly. I know that there were a number of these type cases that I asked him questions about or he learned of and maybe volunteered such information to me. If I tried to give you a number it would be strictly a guess.

Q. During the conversations you had concerning stocks and bonds I think you testified that there was mentioned by Mr. Zochowski a robbery of a messenger from a New York brokerage firm; is that right? A. Yes, sir.

Q. When you heard that did Chester say that he knew some of the people involved or he had an in or he was able to help out in that regard? Did he say anything like that? A. I don't recall whether he did or not. Usually, when matters of that kind—very vague, he didn't know the name of any one or place or business involved. Our conversation with respect to that particular thing would end up: 'Well, let me know if you find out anything else about it.'

* * * * *

Q. Did you ever speak again to Chester concerning this New York brokerage matter other than the initial conversation that you perhaps testified to? A. I don't recall it. If I did it was merely a passing, 'Did you find out anything else about that?' * * *

* * * * *

Q. Did you participate in any stocks or bonds theft in which Chester also participated? A. I asked him about, I am sure, a number of them. Exactly how many I don't know.

Q. In any of them did Chester report to you minutely the details or did he have carte blanche in his operations and report as he saw fit to? A. Well, when we got onto the subject of that nature I asked all of the questions I thought were pertinent and, in many instances, he volunteered information. * * * "

See also R. 283-286, where Clinkscales admitted that in other matters which he had worked on with Zochowski, the latter would of necessity mingle with the criminal principals both before and after the commission of a crime. The Court prevented the defense attorneys from further interrogating Clinkscales as to whether his knowledge and condonation of such activity by Zochowski meant that the F.B.I. was in effect winking at Zochowski's himself engaging in criminal activities (R. 285-287).

F.B.I. Agent Marlin H. Moore of the Chicago office testified he first met Zochowski on July 30, 1962, in Chicago, at which time they had a conversation concerning Wuensche, who was a co-defendant under this "Sutro" indictment, the conversation being (R. 297):

"A. He said that Wuensche had contacted him and had access to a number of securities. I don't recall whether he said they had been stolen or would be stolen, but that it would be a theft, it would be larger than the Bache theft, and he didn't know the identity of the stock brokerage firm that was going to be victimized."

Moore further testified concerning Zochowski's mention of Wuensche as follows (R. 301-304):

"A. I had conversations with him—the first conversation I had with him was in the Secret Service office in Chicago on July 30th and I had conversations with him each day thereafter for a period of approximately a week.

Q. The conversations encompassed what matters? A. The beginning conversation, the first conversation I had with him, lasted several hours and it started in connection with a list of a million and a half dollars in United States Government bonds that had been offered for sale; the serial numbers had been offered but no bonds had been produced. Secret Service were first considering the possibility of counterfeit: when they found out that these numbers that they were not counterfeit and possibly did not involve counterfeit, and they called the F.B.I. on the possibility they were stolen."

* * * * *

"Q. What was the purpose of the meeting on July 30th? Do you remember? Why did you meet, to begin with? A. To get the information regarding this list of bonds and also we discussed Canadian bonds which had been offered for sale, stolen Canadian bonds.

Q. Did you speak to Chester for a couple of hours on that occasion? A. Longer than that, I believe.

* * * * *

Q. Was it on that day that he mentioned Wuensche to you? A. I don't recall that he mentioned Wuensche's name on that day. If it was not on that day it was within a period of two or three days after the 30th of July.

Q. Did he provide you with a phone number that he heard Wuensche call? A. Yes.

* * * * *

Q. Did he say he thought it was the number of a stock brokerage house? Did he say that to you? A. I don't recall specifically that he said it was the number of a stock brokerage house. I remember him saying that Wuensche had access to a large number of bonds which were going to be stolen from a brokerage house and that he was involved with a New York attorney, I believe, in connection with this theft, and he believed that this number was the number of the attorney, I think—I'm not positive of it."

Moore also, like Clinkscales, stated that he knew Zochowski was having direct contact with criminal principals in matters on which they were working; in one instance Zochowski was in contact with the fences who were trying to liquidate certain stolen securities in another case (R. 305). The Court prevented the defense from eliciting whether Moore and the F.B.I. knew that Zochowski was himself committing a crime in such a situation (*ibid*).

The Court also prevented the defense, in the cross-examination of F.B.I. Agent Moore, from eliciting what Zochowski's participation was in two other securities thefts (R. 306). (By closing off these avenues of inquiry the Court prevented the defense from establishing the nature of Zochowski's authority and of the pattern of his actions as an undercover operative, which would have been obviously relevant to the issue of whether Zochowski was in a position to perpetrate an entrapment operation in this case against Prezioso.)

F.B.I. Agent Arthur F. Nehrbass stated that in interviews with Zochowski after the latter's arrest in the Sutro case around the middle of 1963, Zochowski had pleaded to be freed from the Sutro indictment, Nehrbass' account of Zochowski's reasons paralleling just about exactly the explanation which Zochowski gave in the instant hearing about a year later (R. 309):

Secret Service Agent Carmine Motto of the New York office, called by Zochowski as a rebuttal witness (R. 318 *et seq.*), had known Zochowski since the fall of 1961, had worked with him on Government matters, and had spoken with him twenty to thirty times about these matters (R. 318-319). Also (R. 320-321:

> "A. Chester stated that the reason he had gotten involved in the Sutro thefts was that he was attempting to build a large case and he had allowed the small thefts, as he said, to go by in order to build a larger case for the Bureau and he, at that time, told me that he had been reporting this activity that he was engaged in to Clinkscales in Miami * * *
>
> Q. At any other times prior to the fall or late 1962 did you ever have occasion to speak with Mr. Zochowski concerning thefts of bonds or stocks? Did he ever speak to you about it? A. He had spoken to me about stocks and bonds on many occasions and on some occasions they were government bonds and other times he mentioned stocks and bonds, and I assumed that he was working with the FBI on that at the time.
>
> Q. Did he ever mention a man by the name of Wuensche to you? A. Yes, sir.
>
> * * * * *

> Q. This is prior to August of 1962? A. I think it was. The first time he mentioned Wuensche to me might have been in July of 1962 or probably June. June or July."

Prezioso testified that while he was working for Sutro in 1961 someone named Norman Meyers introduced Zochowski to him under the name of Chester Gray with the idea that a business might be started to import tuna fish for sale in this country, Prezioso on that occasion borrowing $1,000 from Zochowski (R. 326-328). In December 1961, Zochowski demanded that Prezioso steal some stock because of the unpaid $1,000 loan, and Zochowski threatened him that he would be beaten up if he refused, Prezioso pleading that it was impossible to get away with any such theft, and asking Zochowski for time to repay the loan, but Zochowski insisted and repeated the threats (R. 328-329). Prezioso then did steal a $5,000 United States certificate from Sutro for Zochowski because he feared the latter's threats (R. 329). Around the following June Zochowski came with another man named Jim Motley, "a big heavy fellow", who threatened harm to Prezioso's family (wife and three young children), unless Prezioso stole more stock; Motley grabbed hold of Prezioso and threatened to kill him, whereafter Prezioso stole 500 shares of American Natural Gas for Zochowski (R. 329-331). Thereafter in July 1962 Motley threatened to expose Prezioso to his employer unless he stole more stock, and Prezioso stole some Food Fair Properties securities (R. 162-163).

Prezioso said he had not mentioned these facts concerning threats and duress in his testimony at the "Sutro" trial of the severed co-defendant Giuliano because he was afraid of

Motley and is still afraid, but that before the latter trial Prezioso had disclosed some of these facts in a conference with his own counsel and Assistant United States Attorneys Fleming and Murdoch, where he had still not mentioned Motley by reason of his fear of that man (R. 332-333).

Prezioso said he had learned about a year ago from a man named Hess that Zochowski was an informer in the Sutro case and in various cases originating in Miami, but that he had not told his attorneys (Messrs. Maurice and Philip Edelbaum) of having known this about Zochowski until the day of the within hearing (July 29, 1964) (R. 334).

On cross-examination Prezioso became confused as to whether he had advised his attorney about the duress and the threats (R. 336-337, 341), but it is evident that the reason for Prezioso's confusion was that he momentarily mixed together (1) his not having told his attorney about Zochowski's informer history with (2) the subject of the duress and threats; this was cleared up at R. 337 and 343-344.

3. Denial of the Defense Request for "3500" Material and Other Relevant Records

Prezioso's attorney in this hearing requested, but was refused by the court, all of the relevant "3500" materials (R. 290-292). Agent Clinkscales had testified that he had made some notes of his dealings with Zochowski and had used those notes in helping him to prepare for his testimony in this hearing, including notes of the previously mentioned conversation in which Zochowski had told him about a large robbery of securities (R. 272-274). Clinkscales also said that records were maintained of payments made to Zochowski (R. 290). We quote the colloquy in

which Prezioso's request for the "3500" material was refused by the Court (R. 290-292):

> "Mr. Edelbaum: Your Honor, I call for any 3500 material that pertains to this case. I believe that although this is not an actual trial the question here is of the utmost importance and I think 3500 would apply to this hearing.
>
> Mr. Fleming: I do not think it does since the witness has already testified at the trial. In addition, any reports that may have been made—I am not fully familiar with it, because I didn't choose to inquire or have anything to do with—
>
> The Court: I will sustain the objection.
>
> I already have had occasion to rule on this matter. I am convinced that the statute does not contemplate this type of exploration in this type of hearing. It would greatly prolong this matter beyond any possible justification for the United States Attorney to be placed under the same burden and duty as he would be at the full-pledged trial.
>
> Mr. Edelbaum: To protect the record I make it not only under the 3500 material but on the prior decisions in the Jencks case and other cases. I would not only base it upon 3500, but I base it on the decisions prior to 3500 which would require it; although the decisions were actually based on trial, I believe they can be expanded to a hearing as this. That is to broaden my exception at this time.
>
> The Court: Your exception is broadened and I adhere to the same ruling."

4. The Denial of the Motions for Withdrawal of Plea of Guilty

The Court found that Zochowski's activities in the Sutro thefts were not performed as part of his work for the Government but were an independent criminal enterprise

of his own, so that he was properly prosecuted and properly entered his plea of guilty against a valid charge (R. 350-352). The Court also declared that Zochowski's testimony "is unworthy of belief". The Court thereupon denied Zochowski's motion to withdraw his plea of guilty (R. 352).

As to Prezioso's motion, the Court declared that its finding as to Zochowski "takes the ground out from underneath Mr. Prezioso's claim of entrapment. He was dealing with a fellow criminal and not with a government agent" (R. 350). The Court also stated that Prezioso's testimony is "unworthy of belief" (R. 352).

5. The Opinion of the Court of Appeals

The Court of Appeals was apparently decisively impressed with Prezioso's admission at the hearing on his motion that about a year earlier he had learned from someone named Hess that Zochowski was an informer in the *Sutro* case (R. 334). The Court of Appeals apparently also felt no difficulty about the undisputed fact that Prezioso's attorneys never knew anything about all of this until after Zochowski filed his own papers for withdrawal of the plea of guilty, the Court saying (Appendix hereto, *infra*):

> "• • • Prezioso at all times had the full assistance of counsel. Certainly there was enough to put him and his attorneys on inquiry concerning the possibility that the duress defense, which he freely and knowingly waived, might be developed to raise the issue of entrapment. Despite the policy of liberality, we would be reluctant to find that Judge Palmieri abused his discretion and to hold that Prezioso may assert surprise as a valid basis for a change of plea, where such a claim rests upon a failure to tell his

> lawyers something of obvious interest and where the only extenuating circumstances pointed to are the alleged generality of the information supplied by Hess, coupled with appellant's claimed lack of sophistication and thoroughly shaken condition."

The Court also adduced as "an additional circumstance which militates against the pre-sentence policy of liberality and supports affirmance," that Prezioso did not move promptly enough to withdraw the guilty plea but did so only after a prison sentence was in prospect.*

The Court also rejected our Jencks Act contention on the ground that the statutes operates only at the trial of the indictment; and on the further ground that the material sought "was not relevant to the central question before Judge Palmieri, i.e., whether there were credible substantial reasons for not raising the informant and entrapment defenses at the time the guilty pleas were entered or within a reasonable time thereafter."

REASONS FOR GRANTING THE WRIT

I.

The short-shrift sort of decisional reasoning by which Prezioso has been denied, at the hands of both of the Courts below, the right to withdraw a *pre-sentence* guilty plea despite the notably liberal provisions of Rule 32(d) F.R. Cr. P. presents a misuse of the powers of administration of Federal criminal justice which this Court should review and correct.

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* This "prospect" was long before the sentencing, we would point out.

The motion should have been granted because it is uncontroverted that Prezioso's counsel, at the time of recommending the plea of guilty to Prezioso, did not know anything about Zochowski's background as a Government informer, and hence counsel was precluded from discerning, much less evaluating, a possible defense of entrapment based upon Prezioso's allegation that Zochowski had coerced him. Surely this was sufficient to require the granting of a motion made *prior to sentence.*

Prezioso's testimony that Zochowski coerced him into committing the Sutro thefts is likewise uncontroverted. If, then, the record also presents sufficient facts as to Zochowski's being an agent provocateur to make colorable a defense of entrapment, justice requires that Prezioso be given an opportunity to raise that defense at a trial upon a plea of not guilty. And the District Court should not have taken it upon itself to dispose of the question of the colorability of the entrapment defense in advance of such a trial; *the Court should have borne in mind that a Judge presiding over such a future trial could in his discretion allow the defense of entrapment to go to the jury rather than deciding it as a matter of law.*

In any event, both Courts below failed to take into due consideration the uncontroverted testimony that Prezioso's attorneys had no knowledge at the time of the guilty plea that an entrapment defense might be possible. The attorneys knew of Prezioso's claims that Zochowski had coerced him. But they did not know of Zochowski's history as a Government informer. In these circumstances, Prezioso, even though he himself knew of Zochowski's informer background, did not understandingly enter his plea of guilty,

because his doing so upon the advice of counsel occurred in a setting in which counsel were themselves not advised of the facts known to their client. Prezioso's failure to communicate to his attorneys his knowledge of Zochowski's informer-role should not be held against him in deciding a *pre-sentence* motion to withdraw a plea of guilty. Prezioso is a layman, and it is manifest from the instant hearing record that he is not a particularly sophisticated man, besides which (as the instant hearing record also shows) Prezioso has been badly shaken by the disastrous experience of this prosecution. He is not a hardened criminal type; throughout this case he has been a very worried man, who was far from being in the best command of his own (limitedly) best faculties of judgment and awareness.

Before noting the authorities, we respectfully offer one more observation about the circumstances of the denial of Prezioso's motion: The District Court expressly found that both Prezioso and Zochowski were "unworthy of belief". This finding, again, occurred in the framework of an effort by Prezioso to show that a trial of the issue of his guilt or innocence would or might be worthwhile in his individual interest because of the possibility of the defense of entrapment. *Is it conceivable that, if Prezioso were given a trial on a plea of not guilty, a properly advised Trial Judge would take it upon himself to foreclose jury consideration of the entrapment defense upon a finding of the non-credibility of the defense witnesses?*

Rule 32(d) shows on its face that motions for withdrawal of a plea of guilty prior to sentence stand on a much more liberal footing than motions after sentence.

The distinction between the liberal right to withdraw a plea of guilty before sentence, and the more restricted right to do so after sentence, was remarked upon in some detail, with collection of the authorities, in *Kadwell* v. *United States*, 315 F. 2d 667, 670 (C.A. 9, 1963). See also the liberal application of Rule 32(d) in *United States* v. *Lester*, 247 F. 2d 496 (C.A. 2, 1957) where the Court, said, *inter alia*, "Surely the standard for determining whether a plea of guilty should be withdrawn prior to sentence under Rule 32(d) is not less favorable to the defendant than the standard for acceptance of such a plea under Rule 11" (247 F. 2d at 501).

This Court in *Kercheval* v. *United States*, 274 U.S. 220, spoke words which are quite apt in the present situation. The issue directly presented in *Kercheval* was whether a withdrawn plea of guilty may subsequently be used as evidence against a defendant, the Court holding that it could not be so used. In the course of its reasoning on this question the Court noted how carefully the law protects a defendant against the unjust consequences of a plea of guilty. The Court said (274 U.S. at 223-224):

> "A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence. Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences. When one so pleads he may be held bound. United States v. Bayaud (C.C.) 23 Fed. 721. But, on timely

application, the court will vacate a plea of guilty shown to have been *unfairly obtained or given through igorance, fear or inadvertence. Such an application does not involve any question of guilt or innocense.* Com. v. Crapo, 212 Mass. 208, 98 N.E. 702. The court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial *if for any reason the granting of the privilege seems fair and just.* Swang v. State, 2 Coldw. 212, 88 Am. Dec. 593; State v. Maresca, 85 Conn. 509, 83 Atl. 635; State v. Nicholas, 46 Mont. 470, 472, 128 Pac. 543; State v. Stephens, 71 Mo. 535; People v. McCrory, 41 Cal. 458, 461; State v. Coston, 113 La. 717, 720, 37 So. 619; Bishop, New Crim. Proc. § 747." (Emphasis supplied.)

The Court of Appeals of the State of New York has noted that the ultimate foundation of a defendant's right to move for withdrawal of a plea of guilty that is alleged to have been entered under circumstances of fundamental unfairness to the defendant is the right to constitutional due process. *Lyons* v. *Goldstein,* 290 N.Y. 19, 23, 25-27, 47 N.E. 2d 425 (1943). The constitutional due-process foundation of this right was remarked upon quite recently as obtaining likewise in the practice in the Federal courts. See the decision by United States District Judge Weinfeld in *United States* v. *Tateo,* 214 F. Supp. 560, 565 (S.D.N.Y. 1963).

The rule of the *Kercheval* case, supra, that a motion of the present type does not involve the issue of the defendant's guilt or innocense, is stated also in *Woodring* v. *United States,* 248 F. 2d 166, 169 (C.A. 8, 1957); *Friedman* v. *United States,* 200 F. 2d 690, 696 (C.A. 8, 1962); *Richardson* v. *United States,* 217 F. 2d 696, 699 (C.A. 8, 1954).

See the resounding and forward-looking expressions of liberality in regard to this subject in, e.g., *Gearhart* v. *United States,* 272 F. 2d 499, 502-503 (C.A.D.C. 1959); *Bergen* v. *United States,* 145 F. 2d 181, 187 (C.C.A. 8, 1944); *Poole* v. *United States,* 250 F. 2d 396, 400 (C.A.D.C. 1957); *United States* v. *Lias,* 173 F. 2d 685, 688 (C.A. 4, 1949).

The pertinency of the factor of a defendant's having had the effective assistance of counsel in entering a plea of guilty, is emphasized in *United States* v. *Davis,* 212 F. 2d 264, 267 (C.A. 7, 1954). In *Davis* the defendant alleged that his attorney had misadvised him; in our case we claim that the client failed to give the attorney the necessary information to enable the attorney to advise the client properly. The principle is the same in both situations—the need for effective and mutually understanding communication between attorney and client.

Additional cases which attach importance to the factor of a defendant's ignorance or understanding of his rights in having pleaded guilty, are *United States* v. *Colonna,* 142 F. 2d 210 (C.C.A. 3, 1944); *United States* v. *Fox,* 130 F. 2d 56 (C.C.A. 3, 1942), cert. denied 317 U.S. 666.

See also *Williams* v. *United States,* 192 F. 2d 39, 40 (C.A. 5, 1951), where the Court emphasized the *reviewability* of the lower court's exercise of discretion, the factors of a defendant's justifiable ignorance of his rights or his lack of understanding or misapprehension of his legal rights, and the basic standard of fairness and justice which is served by the granting of such a motion.

II.

This case presents the important question of whether the Jencks Act protections may operate in proceedings upon motions for withdrawal of a plea of guilty. This Court will, of course, make its own evaluation of the importance of this question in the administration of Federal criminal justice, but we would respectfully offer the suggestion that from the standpoint of that section of the Bar especially engaged in the defense of criminal cases the question is one upon which it would be of immediate contemporary value to have a determination by this Court. None of the cases cited by the Court below for its ruling that the Jencks Act "applies only to statements that must be produced after a witness testifies at the trial" dealt with a motion to withdraw a plea of guilty or with any comparable situation. Of those cases cited by the Court below, *United States* v. *Abrams,* 29 F.R.D. 178, 183 (S.D.N.Y. 1961) involved a pretrial motion for dismissal of the indictment; *United States* v. *Tane,* 29 F.R.D. 131, 133 (E.D.N.Y. 1962) is the same; *United States* v. *Rosenberg,* 157 F. Supp. 654 (E.D.Pa 1958) involved a motion for a new trial on the ground, *inter alia,* of denial of the right to examine F.B.I. files prior to the trial.

Prezioso sought disclosure of the notes and records in question not only under the Jencks Act but also under the principle of *Brady* v. *Maryland,* 373 U.S. 83. This request was not made *in vacuo.* The refusal to permit access to the Government's records of financial payments to Zochowski was plainly prejudicial. These records might well open avenues for a significant elucidation of Zochowski's undercover activities during the times pertinent herein and in

regard to the subject matter of the Sutro case. It will be recalled that Zochowski's own contentions were that he was handling the Sutro situation integratedly with other undercover matters in which he was engaged for the Government; and that the Government Agents themselves, especially F.B.I. Agent Moore and Secret Service Agent Motto, were even less at variance from Zochowski in their testimony than was F.B.I. Agent Clinkscales. And further as regards Clinkscales, he admitted that he had made notes of Zochowski's relatively early discussions with him about a prospective theft of securities. These notes of Clinkscales should surely have been made available.

When the above mentioned refusal to require production of the Government's notes and records is considered together with the several instances where the District Court blocked the defense from exploring Zochowski's pattern of conduct and the pattern of his relationships with the Government Agents in handling similar cases, the conclusion seems to us inescapable that the Court unfairly handicapped Prezioso's efforts to develop the full facts of Zochowski's role.

It should be borne in mind always, that this was a hearing on a *pre-sentence* motion for withdrawal of a plea of guilty. The procedural constrictions to which we were subjected by the District Court in this hearing were in disregard of the principles of procedural liberality and plenary judicial inquiry which, under the authorities cited in "Reason" I, *supra,* are supposed to be the hallmark of this type of hearing.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

MAURICE EDELBAUM
Attorney for petitioner
Mario Prezioso

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 216—September Term, 1964.

(Argued April 22, 1965 Decided July 9, 1965.)

Docket No. 29077

UNITED STATES OF AMERICA,

Appellee,

—v.—

CHARLES J. GIULIANO, MARIO PREZIOSO and CHESTER ZOCHOWSKI, a/k/a Chester Gray,

Appellants.

Before:

KAUFMAN, HAYS and ANDERSON,

Circuit Judges.

Appeal by Giuliano from jury verdict and a judgment entered thereon, convicting him of a charge of transporting stolen securities in interstate commerce, knowing them to have been stolen, Title 18 U. S. C. §2314; and appeals by Prezioso and Zochowski from judgments of conviction following denials of their motions to change their guilty pleas to "not guilty" under Rule 32 F. R. Crim. P., on two charges of transporting stolen securities in interstate commerce, knowing them to have been stolen, and one charge of conspiring to commit such offenses, by the United States District Court for the Southern District of New York, Edmund L. Palmieri, *J.* Affirmed.

FRANCES KAHN, Esq., Bronx, New York, *for appellant, Charles J. Giuliano.*

MAURICE EDELBAUM, New York, New York, *attorney for appellant, Mario Prezioso.*

KENNETH KAPLAN, Esq., New York, New York, *for appellant, Chester Zochowski.*

PETER FLEMING, JR., Esq., Ass't U. S. Atty., Southern District of New York (Robert M. Morgenthau, U. S. Atty., and Robert J. McGuire, Ass't U. S. Atty., Southern District of New York, on the brief), *for appellee.*

ANDERSON, *Circuit Judge*:

The appellant Prezioso in 1961 and 1962 was a cash margin clerk in the stock brokerage firm of Sutro Brothers & Co. in New York City. It was his job to receive securities which were traded by Sutro Brothers in execution of orders placed with its branch offices in Washington, D. C., and Miami, Florida, and which were delivered to Sutro Brothers' New York Office for transfer against payment. It was Prezioso's duty to record their delivery and route them on to another department of Sutro Brothers. He met Zochowski in October, 1961 and they discussed a means of stealing securities which came into Prezioso's hands in the course of his work. In December, 1961, for a payment of $1200, Prezioso misappropriated a $5000 U. S. Treasury Bond, and delivered it to Zochowski, who took it to Holly-

wood, Florida, cashed it and deposited the proceeds in his own bank account.

In May, 1962, Prezioso took 550 shares of the common stock of American Natural Gas Co. which came to his desk in the course of being delivered to Sutro Brothers. Prezioso turned these shares over to Zochowski at a restaurant in New York and received from him, as part payment, $5000. Through an accomplice, and co-defendant, named Naidich, Zochowski sold and delivered the shares to another co-defendant, Tritt, of Toronto, Canada for $7000, transporting them to Montreal.

On June 29, 1962 the defendant Naidich had a discussion in New York with another defendant named Wuensche, whom he had met a month or two before when Wuensche had attempted to buy an Alabama bank. At that time each disclosed to the other that he was dealing in stolen securities, and in mid-June Naidich introduced Wuensche to Zochowski. When Naidich met Wuensche on June 29, 1962, he told Wuensche that some securities were available for $5000. Wuensche then turned over $5000 in cash to Naidich, who paid it over to Zochowski, who delivered it to Prezioso, who was unable at that time to deliver the securities.

Wuensche, as president of Holland Construction Co., in December of 1961 had entered into a contract to perform certain dredging work at Stone Harbor Manor, New Jersey, for the defendant Giuliano, whom Wuensche had known since 1958. In April, 1962, Giuliano was in serious financial difficulties and conferred with Wuensche about raising some capital. Through one DiFonzo, who dealt in stolen securities, but who was not a defendant or co-conspirator in this

case, Wuensche procured some securities concerning which Wuensche told Giuliano that they "were being lifted from the locker, from the vault of the brokerage firm" and that they "were hot securities and that there was no way of replacing them" and that they were "all bluechip securities —from Sutro Brothers here in New York City."

After the incomplete transaction of June 29, 1962 when Wuensche had paid $5000 which ultimately went into the hands of Prezioso and for which Prezioso had, at the time, no securities to deliver, arrangements were made for a meeting on July 2, 1962 at the Summit Hotel in New York to which Wuensche took Giuliano. At this time DiFonzo procured the delivery to Wuensche of eight $10,000 Treasury Bonds registered in the name of Greenberg. Wuensche passed the bonds over to Giuliano and Zochowski and asked Giuliano if Giuliano could "do anything with these, with the people in New Jersey" to which Giuliano replied, "he didn't know for sure. He'd have to check into it." Wuensche also complained to Zochowski because he had received nothing for the $5000 which he had paid over for securities which Prezioso had failed to deliver.

On July 6, 1962, Zochowski called Prezioso who said he had some stolen securities, available for delivery. That evening at the Summit Hotel in New York Prezioso delivered ten $1000 Food Fair Properties Bonds to Zochowski who handed them over to Wuensche. On the morning of July 7th Wuensche called Giuliano and told him that "he had gotten delivery on something." On July 8th Wuensche and Giuliano met at Giuliano's office at Stone Harbor Manor, New Jersey, and Wuensche displayed all of the ten

Food Fair Properties Bonds and said that they were some of the bonds he had gotten from the people in New York City and added, "Look, they're hot, you got to handle them carefully. They're not on any hot sheet yet, to the best of my knowledge and as far as I am concerned, as long as you put them away with people that you know it will be okay." Although Giuliano wanted all ten bonds, Wuensche delivered only four of them to him. Later Giuliano sold the bonds through the Millville Trust Co., Millville, New Jersey, which was unaware that the bonds did not rightfully belong to Giuliano.

On January 7, 1963, an indictment, in four counts, was returned against Giuliano, Prezioso and Zochowski, as well as against several other defendants. The first count charged Prezioso and Zochowski with transporting and causing to be transported in December, 1961, a $5000 U. S. Treasury Bond from New York to Florida knowing it was stolen. The second count similarly charged Prezioso and Zochowski, with Naidich and Tritt, with transporting 550 shares of American Natural Gas Co. in May, 1962, from New York to Montreal, Canada. The third count charged Giuliano, Prezioso, Zochowski and Wuensche with the like offense for transporting ten $1000 Food Fair Properties Bonds from New York to New Jersey and Pennsylvania in July, 1962. The fourth count charged all of the defendants, named in the first three counts, with conspiracy to commit the substantive offenses described in those three counts.

Prezioso, Zochowski and Giuliano all pleaded "not guilty" and the case against those three was assigned for trial on May 6, 1964. At that time Prezioso and Zochowski, after

an extensive *voir dire* by the court, changed their pleas to "guilty" and testified in Giuliano's case as Government witnesses. On May 13, 1964, the jury found Giuliano guilty on the third count and not guilty on the fourth. On June 12, 1964 Zochowski moved to withdraw his guilty plea on the ground that in participating in the thefts from Sutro Brothers, he was actually acting as an informant for the F. B. I. and, therefore, had no criminal intent. On June 19, 1964 Judge Palmieri sentenced Giuliano to imprisonment for two years. Prezioso on that day asked for an adjournment of the imposition of sentence in his case in order that he could attend to personal matters. Judge Palmieri adjourned the matter to July 7, 1964, and in so doing clearly implied that Prezioso would have to serve a sentence of imprisonment. On July 7th Prezioso orally moved for leave to withdraw his plea of guilty on the ground that his apparent criminal activity was forced upon him by duress and that the disclosure by Zochowski that he was an F. B. I. informant revealed for the first time that he, Prezioso, had been entrapped.

Judge Palmieri assigned the hearings on Zochowski's and Prezioso's motions for July 29, 1964 and they were heard on that day. The motions were denied and each defendant was sentenced. At this hearing evidence was heard concerning Zochowski's connection with the F. B. I., its relationship to this case, and prior knowledge by Prezioso of Zochowski's activity as an informant. Judge Palmieri found, on ample evidence, that despite Zochowski's work with the F. B. I., his activity in connection with the *Sutro* case was "an independent criminal enterprise having no

relationship whatsoever with any branch of the government . . ."

Giuliano

Although Giuliano admits receiving the bonds, he claims that everything he did was consistent with the actions of a business man acting in good faith, that in fact he did not know that his handling of the bonds was a part of a criminal enterprise and that the government failed to prove beyond a reasonable doubt that he had such guilty knowledge. Wuensche's testimony, however, established that Giuliano knew that Wuensche was dealing in stolen securities and that the Food Fair Properties Bonds themselves were stolen. It was within the province of the jury to believe him or not. *United States* v. *Robbins,* 340 F. 2d 684, 687 (2d Cir. 1965). We find that there was ample evidence to convince the jury beyond a reasonable doubt of appellant's guilty knowledge.

Giuliano contends that he was deprived of due process of law by the "inconsistent verdict" of the jury. Specifically, the claim is that an acquittal on the broad conspiracy count precluded conviction on a substantive count in the same proceeding because the Government relied on the same evidence to prove its case on both counts. The argument is devoid of merit for several reasons. First, no principles of *res judicata* are involved here. *United States* v. *Dovico,* 329 F. 2d 52 (2d Cir. 1964); cf. *Sealfon* v. *United States,* 332 U.S. 575 (1946). Second, the verdict was not necessarily inconsistent, for the elements of the two crimes charged in the separate counts are different. See *United*

States v. *Robinson*, 320 F. 2d 880, 881-2 (2d Cir. 1963). As Judge Palmieri pointed out in his instructions, knowledge of the interstate or foreign transportation was required for conviction on the conspiracy count, but such knowledge was not an element of the substantive offense and hence need not be found in order to convict on the substantive count.

Giuliano next contends that Judge Palmieri committed reversible error by failing to marshal the evidence in his charge to the jury. However, there was no request or objection on this point. Moreover, the charge as a whole deals adequately with the evidence, and the court not only stressed the significance of the critical issue of Giuliano's state of mind, but instructed the jury that acceptance of Giuliano's testimony would require an acquittal. Clearly appellant may not be heard to complain of the charge.

Appellant's remaining specification of error is that Zochowski's trial testimony was false and that the prosecution knowingly presented this testimony to the jury without correction, thereby denying him due process of law. *Napue* v. *Illinois*, 360 U. S. 264, 269 (1959). The argument is based entirely on Zochowski's post-trial testimony that he acted as informant for the F. B. I. in this case. As pointed out above, Judge Palmieri found this testimony unworthy of belief. Moreover, Zochowski's claim that he himself lacked criminal intent in no way amounted to a recantation of his testimony at Giuliano's trial about what actually happened. There is thus nothing to indicate that Zochowski testified falsely.

Assuming that Zochowski's post-trial allegation had been presented to the jury, this would have amounted to

no more than cumulative evidence as to Zochowski's credibility. Giuliano's counsel on cross-examination explored and attacked Zochowski's credibility because of Zochowski's role as an F. B. I. informant. Indeed in his closing argument, defense counsel castigated Zochowski as a spy from the F. B. I.

Since there is no error, the judgment below is affirmed.

Zochowski

Zochowski's principal contention is that the trial court erred in denying his pre-sentence motion, to withdraw his plea of guilty.[1] Rule 32(d), F. R. Crim. P., provides that after sentence the court may set aside a judgment of conviction and permit the defendant to withdraw his plea "to correct manifest injustice." The fair implication is that pre-sentence motions are to be treated with greater liberality. *Kadwell* v. *United States,* 315 F. 2d 667, 670-1 (9th Cir. 1963); *Gearhart* v. *United States,* 272 F. 2d 499, 502-3 (D. C. Cir. 1959). Indeed the Supreme Court has said that on timely application, the court will permit withdrawal of the guilty plea in the exercise of its discretion "if for any reason the granting of the privilege seems fair and just." *Kercheval* v. *United States,* 274 U. S. 220, 224 (1927).

A criminal defendant, however, has no absolute right to withdraw a plea of guilty. *United States* v. *Panebianco,* 208 F. 2d 238 (2d Cir. 1953), cert. denied 347 U. S. 913 (1954). He has the burden of establishing grounds for the withdrawal, *United States* v. *Smiley,* 322 F. 2d 248 (2d

[1] Zochowski's Jencks Act point was raised at the hearing by Prezioso and will be discussed in connection with that appellant.

Cir. 1963), and the determination of whether that burden has been met rests within the discretion of the trial judge, whose decision is reversible only if clearly erroneous. *United States* v. *Hughes*, 325 F. 2d 789 (2d Cir. 1964).

Appellant urges several reasons why in the interests of fairness and justice Judge Palmieri abused his discretion in denying the requested relief. He alleges that he is innocent of the crime of which he was accused because of his role as F. B. I. informant. Moreover, a convincing argument can be made that the government would not be prejudiced at trial by a premature disclosure of its evidence of guilt at Giuliano's trial, for there the critical issue of whether Zochowski was justified in believing that his activities were sanctioned by the F. B. I. was not involved. Finally he claims that since he failed to confide fully in his lawyer respecting his F. B. I. activities, counsel was precluded from receiving a proper evaluation of possible defenses to the charge.

In *United States* v. *Hughes, supra,* at 792, this court rejected the contention that an allegation of innocence coupled with a showing of no unfairness to the government necessarily entitled a defendant to withdraw his plea. Appellant's additional argument—that he failed to confide fully in his lawyer and thus pleaded guilty without proper evaluation of the courses open to him—is without merit. He had more than adequate opportunity to consult with counsel, and the facts on which he bases his belated claim of innocence were available to him prior to his plea. Moreover, Judge Palmieri found Zochowski's allegation as to his F. B. I. role in this case totally incredible. It is thus in-

ferable that Zochowski's failure to confide in his lawyer was not the result of inadvertence. Under the circumstances disclosed here, it would strain credulity to hold that Zochowski has advanced a reason which would make the granting of the motion appear "fair and just."

An extremely careful *voir dire,* conducted at the time the guilty plea was entered, disclosed that the plea was entered voluntarily, with full knowledge of what was involved, and was in no way the result of fear, fraud or ignorance. *Kercheval* v. *United States, supra,* at 224. By any standard the plea was valid and Judge Palmieri's refusal to permit its withdrawal was not an abuse of discretion.

The conviction of Zochowski is affirmed.

Prezioso

Prezioso's belated entrapment defense is based on alleged 32(d) motion. He contends that Zochowski's belated revelations furnished him with an entrapment defense and that, if he and his attorneys had been aware of the possibility of such a defense, he would not have pleaded guilty.

Prezioso's belated entrapment defense is based on alleged coercion by Zochowski acting in the capacity of an F. B. I. informant. But the facts, on which the alleged coercion was based, were known to appellant before he made his guilty plea. Although he claimed ignorance of the specifics of Zochowski's allegations, he admitted at the hearing on his motion that almost one year before the guilty plea he learned from one Hess that Zochowski was an informer in the *Sutro* case, although Prezioso himself never told his attorneys about it. Prezioso at all times had the full assist-

ance of counsel. Certainly there was enough to put him and his attorneys on inquiry concerning the possibility that the duress defense, which he freely and knowingly waived, might be developed to raise the issue of entrapment. Despite the policy of liberality, we would be reluctant to find that Judge Palmieri abused his discretion and to hold that Prezioso may assert surprise as a valid basis for a change of plea, where such a claim rests upon a failure to tell his lawyers something of obvious interest and where the only extenuating circumstances pointed to are the alleged generality of the information supplied by Hess, coupled with appellant's claimed lack of sophistication and thoroughly shaken condition.

There is an additional circumstance which militates against the pre-sentence policy of liberality and supports affirmance. Zochowski's allegations were a matter of public record on June 19th when Prezioso requested a one month adjournment of sentence. Yet no request was made to withdraw the guilty plea at that time. Instead request was made only after the court made it clear that Prezioso could expect to serve some time in prison, thus putting to rest any hope of receiving a suspended sentence. To permit the withdrawal of the plea at this stage would encourage entering the plea merely as a trial balloon to test the attitude of the trial judge. This stratagem has been properly condemned. *United States* v. *Weese,* 145 F. 2d 135 (2d Cir. 1944). We hold that Judge Palmieri acted within his discretion in denying the motion to withdraw the plea of guilty.

Appellant's final contention, joined in by Zochowski, is that he was denied a fair hearing on his motion to withdraw the plea of guilty in that the court improperly deprived him of access to certain government notes and records. Specifically, Prezioso moved for production of Agent Clinkscales' notes relating to his conversations with Zochowski and the records of payments received by the latter from the F. B. I.

The motion was properly denied. The plain language of the Jencks Act, 18 U. S. C. §3500, and consideration of its underlying purpose, compel the conclusion that the discovery procedure therein outlined applies only to statements that must be produced after a witness testifies at the trial. See 1957 U. S. Code Cong. & Admin. News 1869. *United States* v. *Abrams,* 29 F. R. D. 178, 183 (S. D. N. Y. 1961); *United States* v. *Tane,* 29 F. R. D. 131, 133 (E. D. N. Y. 1962); *United States* v. *Rosenberg,* 157 F. Supp. 654 (E. D. Pa. 1958). Moreover, the material sought was not relevant to the central question before Judge Palmieri, i.e., whether there were credible, substantial reasons for not raising the informant and entrapment defenses at the time the guilty pleas were entered or within a reasonable time thereafter.

The conviction of Prezioso is also affirmed.

APPENDIX B

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of July one thousand nine hundred and sixty-five.

Present:

HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

CHARLES J. GIULIANO, MARIO PREZIOSO, CHESTER ZOCHOWSKI, a/k/a CHESTER GRAY, et al.,

Defendants-Appellants.

ARNOLD I. NAIDICH, et al.,

Defendants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they are hereby affirmed.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLEN
Chief Deputy Clerk

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 550

MARIO PREZIOSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 348 F. 2d 217.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1965 (Pet. App. B). On August 6, 1965, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including September 7, 1965, and the petition was filed on that

day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULE INVOLVED

Rule 32(d) of the Federal Rules of Criminal Procedure provides:

> (d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in refusing leave to withdraw a plea of guilty.

2. Whether the court improperly refused to order the production of government records sought pursuant to 18 U.S.C. 3500 during a hearing on a motion to withdraw a plea of guilty.

STATEMENT

An indictment returned on January 7, 1963, in the United States District Court for the Southern District of New York charged petitioner, Zochowski (also known as Gray), Guiliano, and others with knowingly transporting and conspiring to transport stolen securities in interstate commerce. On the day set for trial, May 6, 1964, petitioner and Zochowski, each represented by retained counsel, withdrew previously entered pleas of not guilty and entered pleas of guilty

to two substantive counts and the conspiracy count (R. III, 1a-9a).[1] The two then testified as government witnesses in the case of Guiliano, which culminated in a jury verdict of guilty on one substantive count on May 13, 1964 (Tr. T. 936). On June 12, 1964, Zochowski moved for leave to withdraw his guilty plea, alleging that he had participated in the crimes charged as an F.B.I. informant and therefore without criminal intent (R. I, 16a-23a). Seven days later, on June 19, 1964, when petitioner appeared for sentencing, he requested a one-month adjournment in order to "clean up * * * affairs" which if left unattended would result in substantial financial loss (R. III, 10a-12a). The court granted an adjournment for two weeks, to July 7, 1964, indicating that within this period petitioner should make arrangements to take care of the business (R. III, 12a). On July 7, petitioner orally moved for leave to withdraw his plea of guilty, on the ground that he had participated in the crimes under duress and that the disclosure by Zochowski that he was an F.B.I. informant revealed that petitioner had a defense of entrapment (Tr. H. 2). After a hearing, the motions by petitioner and Zochowski for leave to withdraw their guilty pleas were denied (Tr. H. 183). Petitioner was sentenced to imprisonment for three years with eligibility for parole at such time as the Parole Board should deter-

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[1] All "R." references are to documents filed with this Court in *Guiliano* v. *United States*, No. 516 Misc., this Term. "Tr. T." refers to the transcript of the trial of the co-defendant Guiliano, and "Tr. H" to the transcript of the hearing on petitioner's motion to withdraw his plea of guilty.

mine. 18 U.S.C. 4208(a)(2). The court of appeals affirmed.

1. At the time of the entry of petitioner's plea of guilty on May 6, 1964, the pertinent counts were read and petitioner indicated that he was familiar with and understood the charges and had discussed them with his attorney (See R. III, pp. 1a-9a). Judge Palmieri explained that he would have to ask certain questions, in order to be absolutely certain that the defendants who were entering guilty pleas understood the significance of their pleas and were taking the step freely, with a clear mind, and with proper understanding. Petitioner then stated that he was entering a plea of guilty after conferring with his attorney, and after having told him fully and frankly everything he knew about his case; that he had been told, and understood, that by entering such a plea he could not ask for a trial or assert his innocence at a later date; and that he understood that the only function left to the court was to impose a proper penalty, probably including a prison sentence. When asked if there were any questions that he wanted to ask either his attorney or the court in connection with the plea, petitioner answered in the negative. Judge Palmieri cautioned that, if there were matters which the defendants had to tell him or their attorneys, "this is the time to do it, and I invite you to do it if you consider that to be necessary" (R. III, 6a). Responding to questions by the court, petitioner assured the court that he had not been "subjected to any threats or coercion of any kind or to any promises of any kind by anybody" (R. III, 6a), and that he was taking this

step of his "own free will" and "without reservations of any kind" (R. III, 6a). After cautioning the defendants that each had a duty, and was invited, to speak now if promises or threats had been made, Judge Palmieri indicated that he was prepared to accept the pleas. Counsel were invited to express any opinions or suggestions as to the voluntary nature of the plea, and petitioner's counsel indicated that he had none.

2. At Guiliano's trial, which followed before Judge Palmieri and a jury, petitioner testified that while employed as a cash margin clerk with the New York stock brokerage house of Sutro Brothers and Company he had delivered stolen securities to Zochowski on three separate occasions between December 1961 and mid-July 1962, and had received approximately $11,200 in return (Tr. T. 37-60). Zochowski, in testimony corroborating petitioner's (Tr. T. 61-93), spoke of securities which "he [petitioner] wanted to steal and * * * wanted me to dispose of" (Tr. T. 63), and which "he [petitioner] wanted to sell * * * and * * * wanted to know if I would buy" (Tr. T. 67). On examination by Guiliano's counsel, Zochowski testified that he had worked as an informant for the F.B.I. and the Secret Service in unrelated investigations, and had "in a manner of speaking" proceeded to work as an informant with respect to the theft from Sutro Brothers[2] (Tr. T. 709-710).

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[2] Zochowski, asked what he meant by a "manner of speaking," explained (Tr. T. 709-710):

> Well, I brought it to the attention of the Government that I was looking to solve the Sutro matter, there was

3. At a hearing on the motions to withdraw the pleas of guilty held before Judge Palmieri on July 29, 1964, Zochowski testified that from June 1960 to October 1961 he had worked in an undercover capacity for the F.B.I. at a weekly salary of $125, and afterwards (until his incarceration in April 1964) had personally participated in more than 100 case investigations (Tr. H. 7-11) pursuant to the F.B.I.'s request that he follow through on matters arising from his original investigations. In October 1961 he was approached in Miami about participation in a possible theft from Sutro. The same week he passed the information on to F.B.I. Agent Clinkscales, who advised him to pursue the matter (Tr. H. 21-23). He then flew to New York, was introduced to petitioner, and agreed to find an outlet for the disposal of the stolen bonds (Tr. H. 25). The following day, petitioner sent word to Zochowski that if he was to entrust the bonds to him he wanted an advance of $1000 (Tr. H. 25). Zochowski testified that upon his return to Miami, "I believe I talked to Mr. Clinkscales and told him as far as it went" (Tr. H. 25). In July 1962 he had a conversation with an F.B.I. agent in Chicago about the illegal activities of one Wuensche (a co-defendant who the agents later discovered was involved in the Sutro transactions) but did not specifically mention the Sutro thefts or his participation (Tr. H. 31-36, 38-

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supposed to be a large theft committed in the Sutro case, in the Sutro Company, and I proceeded to work along those lines, where in the meantime two other cases or three other cases arose to a greater magnitude over the Sutro matter that I was proceeding on.

42). He first mentioned his participation in the Sutro matter in August 1962 after he was approached and questioned by Agent Clinkscales about a bond he had negotiated in Miami, and then in September 1962 after his arrest (Tr. H. 44-48).

Agent Clinkscales and two other agents testified that Zochowski had become an informant for the F.B.I. in 1960 under an arrangement whereby he was paid on the basis of the value of information actually received (Tr. H. 91-93). He was specifically warned "that he should not become involved to the extent that he violated any laws, federal state or otherwise; that should he do so he was subject to prosecution" (Tr. H. 95). After the original arrangement terminated in 1961, Zochowski continued to supply information to the F.B.I. (Tr. H. 96). In June or July of 1961 he spoke to agent Clinkscales about contact with an unidentified individual in New York who claimed to have access to securities taken in the robbery of an unidentified messenger of a brokerage company. He did not mention the matter again (Tr. 97). He spoke generally to another agent in Chicago in July 1962 about the activities of co-defendant Wuensche in a contemplated stock theft (Tr. H. 128). However, at no time did he mention the Sutro thefts until he was confronted in August and September 1962 with evidence of his participation (Tr. H. 98-102, 139). He did not assert an informant's defense at that time (Tr. H. 103), or at any time until the fall of 1963, when he claimed that he had become involved in the Sutro thefts in order to build a larger case for the

Bureau (Tr. H. 140). An agent told him that this representation was untrue (Tr. H. 140-141). He was advised then, and again shortly before the entry of his guilty plea, by the agent and by an Assistant United States Attorney, that if he felt he was not guilty he should enter a not guilty plea and that if he had evidence that he was acting as an informant he should discuss it with his attorney and determine whether he had a legal defense (Tr. H. 141-143).

Petitioner testified (see Tr. H. 156-165) that he was first introduced to Zochowski in 1961 in connection with a proposed tuna fish business and that he borrowed $1000 from Zochowski for that business. In December 1961 Zochowski demanded stock for the $1000 and threatened to have some "strong-arm fellows after me" if he did not supply such stock. He delivered securities to Zochowski after that time only because of threats communicated to him by Zochowski or his associate. He was not paid for the stock, although Zochowski gave him $5000 for attorney's fees. He told his attorney of the threats before he entered his plea of guilty (Tr. H. 175; cf. *id.* at 168, 172), but he did not mention the threats when he testified at Guiliano's trial because he was still afraid. He was told in the summer of 1963, almost a year before he entered the plea, that Zochowski was an informant in his and other cases, but did not relay this information to his counsel.

Judge Palmieri, in denying the motions to withdraw the pleas, found that the relationship of Zochowski to the Sutro thefts was "a relationship of an inde-

pendent criminal with an independent criminal enterprise" and that "[h]is testimony is unworthy of belief and Prezioso's testimony is unworthy of belief" (Tr. H. 182-183). Petitioner's counsel stated to the court that petitioner had told him of threats by Zochowski prior to entering his plea of guilty. The court indicated that this would not change its ruling but would be taken into consideration in sentencing (Tr. H. 189-191).

ARGUMENT

1. Whether to grant a pre-sentence application to withdraw a guilty plea is a matter within the sound discretion of the district court. *United States* v. *Hughes*, 325 F.2d 789 (C.A. 2), certiorari denied, 377 U.S. 907; *Zaffarano* v. *United States*, 330 F.2d 114 (C.A. 9), certiorari denied, 379 U.S. 825. The court of appeals correctly found that the district court had not abused its discretion in denying petitioner's application. There is no occasion for further review of this determination, which hinges on the particular facts and circumstances of this case.

The record shows that petitioner entered his plea of guilty voluntarily and knowingly, with assistance of counsel and with every protection by the court. Judge Palmieri conducted careful and searching examination to determine whether petitioner had conferred with his attorney and had told him fully and frankly everything he knew about his case. The judge apprised petitioner in the strongest language of the seriousness of the step he was taking, and repeatedly invited him to speak or ask questions of the court or

his attorney. Petitioner did not give any indication that he had committed the crime under duress, and it seems incredible that petitioner, knowing for a year prior to the entry of his guilty plea that his codefendant had been a government informant, did not comprehend the significance of that fact to a defense of entrapment or mention the fact to his attorney, who had represented him for over a year.

After the entry of his plea of guilty, petitioner took the stand in Guiliano's trial and repeated that he had sold securities to Zochowski, again without any indication of duress or suggestion of entrapment. At the same time, Zochowski testified generally as to his activity as an informant, and a month later filed a motion to withdraw his plea of guilty on the ground that he had been acting as an agent in petitioner's case. Yet petitioner, appearing seven days later, did not at that time ask to withdraw his plea but requested only an adjournment of sentence. As the court below noted, the circumstances suggest that petitioner's later application was prompted by the court's indication in disposing of the request for adjournment that petitioner could expect to be incarcerated (Statement, *supra*, p. 3). Nevertheless, petitioner was given a full hearing on his application. Judge Palmieri's findings that petitioner's and Zochowski's testimony was incredible and that Zochowski, in his dealings with petitioner had not been acting as a government informant, are fully supported by the evidence.

2. During the cross-examination of F.B.I. Agent Clinkscales at the hearing on the motion to with-

draw the pleas of guilty, petitioner's counsel elicited that the witness had maintained records of payments made to Zochowski as an informant (Tr. H. 120-121). There is, however, no merit to petitioner's claim that he was denied a fair hearing because Judge Palmieri denied his request for production of "any [18 U.S.C.] 3500 material that pertains to this case" (Tr. H. 121-122).

Petitioner's sweeping request for production did not suggest any way in which the F.B.I. files might be material or relevant to the issues before Judge Palmieri—whether petitioner's plea of guilty was voluntarily entered, and whether there was any justification or excuse for his failure to raise the entrapment defense prior to the application to withdraw his guilty plea. Zochowski testified that he had not been paid by the F.B.I. in connection with petitioner's case,[3] and the agent's records of payments made to Zochowski for information furnished in other, unrelated cases could not have had any bearing on the question whether Zochowski had entrapped petitioner

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[3] See page 79 and 80 of the transcript of the hearings, as follows:

By the Court:

Q. This money [money owed him by the F.B.I.] has nothing to do with the Sutro matter, has it?

A. They won't release the money until the Sutro matter comes to a disposition.

* * * *

Q. Does any of this money, reimbursement or reward money, have anything to do with the securities that were stolen from Sutro Brothers?

A. No, it does not.

in the Sutro matter. Nor is there any indication that there were any notes of the agent in existence which would have aided petitioner's case. While Zochowski's counsel, on cross-examination of Agent Clinkscales, elicited that Clinkscales sometimes made notes of his conversations with Zochowski concerning the crimes about which the latter furnished information, the agent specifically denied that Zochowski had given him information as to the Sutro matter in the fall of 1961 or at any time prior to his arrest (Tr. H. 98). In these circumstances, the refusal of the court to delay the proceedings and require production was not error.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

RALPH S. SPRITZER,
*Acting Solicitor General.**

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

OCTOBER 1965.

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* The Solicitor General having disqualified himself.

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IN THE

Supreme Court of the United States

October Term, 1965

No. 550

MARIO PREZIOSO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Mario Prezioso, prays that this court grant rehearing of its order of December 6, 1965, denying the petition for a writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in the above entitled case as prayed for in the petition filed herein.

Reasons for Granting Rehearing and Issuing the Writ

A substantial ground available to petitioner was not presented on the previous petition filed herein for the writ. The substantial ground is one affecting the construction of the Constitution insofar as it relates to Congress's control over interstate commerce. The evidence in this case as appears by the record and in the other papers filed in this

proceeding show that Prezioso, while a margin clerk in a securities house in the City of New York, stole securities at the behest of Zochowski, who was an F.B.I. informer. The evidence in the record shows that Prezioso did not participate in any scheme or conspiracy to *transport* the securities in interstate commerce nor to cause them to be so transported. All he did was to steal the securities and to turn them over to Zochowski. So far as Prezioso is concerned, the transaction was complete in the City of New York at the time the theft occurred.

The question therefore is one that goes to the heart of the jurisdiction of the District Court. The question is: may a construction be placed on 18 U.S.C. 2314 and 18 U.S.C. 371 and 2 so as to draw within its ambit activities within a state which so far as the accused is concerned was complete as to him within the state. In other words, is it the rule as stated in *United States* v. *Tannuzzo,* 174 F. 2d 177, that the statute is satisfied if there is proof only that the goods eventually found its way into interstate commerce through the efforts of persons other than the original thief? In that case, the court ruled that it did because the thief "caused" the entry into interstate commerce?

This court in *Pereira* v. *United States,* 347 U.S. 1, in a converse situation held that if the thief had reason to believe that the stolen item would find its way into interstate commerce then the statute applies. In that case a check drawn on a foreign bank was involved and the court assumed that the accused would have reason to believe that the mails and interstate facilities would have been used in having the check cleared. Here, however, securities are involved consisting of bonds and stock and a different

situation is presented. How far can the assumption be stretched so as to impute knoweldge and intent to the thief that the stolen item would find its way into interstate commerce.

There is nothing in the record to show that Prezioso participated in a plan or conspiracy to use interstate media for the disposal of securities. The only evidence points to the limited act of stealing in the City. And the evidence excludes any possible other evidence of participation in a scheme or abetment for a disposal in interstate commerce.

Consequently, the District Court should have granted the application made by Prezioso *before sentence* to withdraw his plea, so as to afford him the opportunity to challenge the jurisdiction of the District Court. The failure to do so has resulted and will result in a denial of a fundamental constitutional right to question the jurisdiction over the prosecution.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

EMANUEL REDFIELD
Counsel for Petitioner

Certificate of Counsel

I HEREBY CERTIFY that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

Dated: December 28, 1965.

EMANUEL REDFIELD
Counsel for Petitioner